Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-595

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Appellants,

and

HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, and ST. MICHAEL SCHOOL,

Appellants,

and

YESHIVAH RAMBAM,

Appellant,

against

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Appellees.

No. 76-713

LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL and ST. MICHAEL SCHOOL,

Appellants,

and

YESHIVAH RAMBAM,

Appellant,

against

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Appellees.

Appeals from the United States District Court for the Southern District of New York

MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16 of the Rules of this Court, the appellees move to dismiss the appeals or affirm the judgment of the court below on the ground that the question upon which review is sought has been rendered so unsubstantial by the unanimous opinion of the District Court that no further review by this Court is necessary or warranted.

Statement of the Case

The appellees accept the Statement of the Case as set forth on pages 6-7 of the Jurisdictional Statement of appellants Levitt and Nyquist.

ARGUMENT

This appeal presents no substantial federal question.

Appellants base their appeal on the assumption that, had this Court not decided *Meek* v. *Pittinger,* 421 U.S. 349 (1975), the judgment of the court below should have and would have been different. We express our disagreement with that assumption and respectfully submit that the same considerations which impelled the judgment in that case would have required judgment for the appellees in the present case. In *Committee for Public Education and Religious Liberty* v. *Nyquist,* 413 U.S. 756 (1973), for example, the Court invalidated a statute providing public funds for the maintenance and repair of church related school buildings, services considerably more distant from teaching than the pupil testing services involved in the present suit. Moreover, we believe that for the reasons set forth in our

brief to the court below the challenged statutes would be declared unconstitutional in that they required excessive entanglement between government and religion. Aside from this, however, we suggest that the appeal herein is *de facto* an effort to persuade this Court to reconsider and reverse its decision in *Meek* v. *Pittinger*. A *de jure* effort to achieve the same result failed when the Court denied the petition for rehearing of the appellees in that case. —— U.S. ——, 95 S. Ct. 2668.

The Pennsylvania statute invalidated in *Meek* specifically included "testing" within its definition of auxiliary services. That part of the statute was declared unconstitutional, even though the testing services were to be conducted by publicly employed personnel rather than, as in the instant case, by the regular church school teachers. It should be especially noted that in respect to "speech and hearing services" this Court went out of its way to indicate that the invalidation of the statute was not intended to apply to such services if they were enacted in a separate statute (421 U.S., at ——, 95 S. Ct. at 1766, fn. 21). The Court, however, made no such disclaimer in respect to "testing services," thus clearly expressing its intention to invalidate state financing of testing services in church schools.

There is, we submit, no way to escape the conclusion reached by the court below:

> We need only repeat what the Court stated in *Meek* to dispose of the constitutional question here. In the present case, it is conceded that the attendance taking and test administration are performed during regular school hours by school personnel and would be so performed whether or not reimbursement is available. It

is, also, conceded that the payments made pursuant to the statute do not represent extraordinary expenditures necessitated primarily by compliance with state requirements. In order to continue to qualify as institutions providing an educational alternative to public schools, the private school beneficiaries must continue to comply with the state's reporting and testing requirements. *See, e.g.,* N.Y. Education Law §§214-216, 3210.2, 3211 (McKinney's 1969, 1970). Compliance with state laws regulating education is as much a part of the educational function of private schools as classroom instruction in secular subjects. For the state to reimburse private schools for compliance in the manner provided by the statute is, in reality, to subsidize their operating costs. In light of these facts, it is clear that the aid to the secular functions of sectarian schools provided by the statute is in fact aid to the sectarian school enterprise as a whole and results in the direct advancement of religion. [Footnote omitted.]

Reversing the decision of the court below would require overruling *Meek*. But that alone would not be sufficient, for the Court would also be required to overrule *Nyquist*, upon which *Meek* was based. Even this would not suffice, since it would meet only the holding of the District Court in the present case that the challenged statute has a primary effect which advances religion. The Court would also be required to reject the challenge that the statute involves excessive government entanglement with religion. Were the Court to do so, it would necessarily overrule *Lemon* v. *Kurtzman* and *Earley* v. *DiCenso,* 403 U.S. 602 (1971). So long as these decisions stand, so too, we suggest, must stand the decision of the court below in the present case.

Conclusion

Appellees respectfully submit that the questions upon which this cause depends are so unsubstantial as not to need further argument, and appellees respectfully move the Court to dismiss these appeals or, in the alternative, to affirm the judgment entered in the cause by the United States District Court.

Respectfully submitted,

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December, 1976